Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31
Justice

----------X

MANABENDRA DATTA and PURABI DATTA,

Plaintiffs,

Index No: 25171/08
Motion Date: 2/3/11
Motion Cal. No: 7
Motion Seq. No: 2

-against-

TERRAPIN INDUSTRIES, LLC and ROCKLEDGE SCAFFOLD CORP.,

Defendants.

----------X

The following papers numbered 1 to 20 read on this motion by plaintiffs for an order, pursuant to CPLR § 306-b, extending plaintiffs' time to serve the summons and complaint in this case; and on this cross-motion by defendant Terrapin Industries, LLC, pursuant to CPLR § 3211, dismissing plaintiffs' complaint against it.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits.....	5 - 8
Answering Affidavits-Exhibits.....	9 - 14
Reply.....	15 - 20

Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff Manabendra Datta ("plaintiff"), as a result of a trip and fall on March 29, 2007, at the premises owned by defendant Terrapin Industries, LLC ("defendant") located at 121-123 West 15th Street, New York, New York. This action was commenced by filing on October 14, 2008, and process was served upon defendant on October 20, 2008, both subsequent to the September 2, 2008 Chapter 11 bankruptcy petition filing of defendant. It is upon the foregoing that plaintiffs move for an order, pursuant to CPLR § 306-b, extending their time to serve the pleadings in this case. Defendant cross-moves for an order,

pursuant to CPLR § 3211, dismissing plaintiffs' complaint against it upon the ground that the action was commenced in violation of the automatic stay imposed, pursuant to 11 U.S.C. § 362(a)(1), and thus, the statute of limitations has expired. Here as the disposition of the cross-motion may render the motion moot, this Court will consider the applications in seriatim.

"A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired (citations omitted). The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies (citations omitted)." Texeria v. BAB Nuclear Radiology, P.C., 43 A.D.3d 403 (2nd Dept. 2007); see, Romanelli v. Disilvio, 76 A.D.3d 553 (2nd Dept. 2010); Minskoff Grant Realty & Management Corp. v. 211 Manager Corp., 71 A.D.3d 843 (2nd Dept. 2010); LaRocca v. DeRicco, 39 A.D.3d 486 (2nd Dept. 2007).

Here, defendant contends that the action should be dismissed on the basis of the expiration of statute of limitation as plaintiffs' filing of the action and purported service of the pleadings after defendant's filing of the bankruptcy petition, renders the commencement of this action a nullity, pursuant to section 362 of the Bankruptcy Code. The following provision states, in pertinent part, the following:

> [T]he commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

In support of dismissal, defendant relies on Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522 (2nd Cir. 1994) and its progeny, stating that plaintiff's complaint is void ab initio. The Rexnord Court, in finding that the entry of judgment by a clerk in violation of an automatic stay was a mere ministerial act, stated the following [21 F.3rd at 527]:

> The stay is effective immediately upon the filing of the petition, Shimer v. Fugazy (In re Fugazy Express, Inc.), 982 F.2d 769, 776 (2d Cir.1992); Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1204 (3d Cir.1991), and any proceedings or actions described in section 362(a)(1) are void and without vitality if they occur after the automatic stay takes effect, see 48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.), 835 F.2d 427, 431 (2d Cir.1987), cert. denied, 485 U.S. 1035, 108 S.Ct. 1596, 99 L.Ed.2d 910 (1988).

> While the commencement or continuation of a judicial action or proceeding clearly is subject to the automatic stay of section 362, we do not believe that the simple and "ministerial" act of the entry of a judgment by the court clerk constitutes the continuation of a judicial proceeding under section 362(a)(1). See Savers Fed. Sav. & Loan Assoc. v. McCarthy Constr. Co. (In re Knightsbridge Dev. Co.), 884 F.2d 145, 148 (4th Cir.1989) (noting that, while court must halt deliberations when bankruptcy intrudes, an arbitration award may be approved "as valid under the [automatic] stay only if the panel decided it in word and deed before [the petition date], leaving for post-petition achievement only the clerical act of recording the award"); Teachers Ins. & Annuity Ass'n v. Butler, 58 B.R. 1019, 1022 (S.D.N.Y.) (rejecting argument that entry of judgment was "void and of no legal force or effect" on ground that filing of the signed judgment and entry on the docket by the clerk "was a purely ministerial act" that did not violate the automatic stay of § 362), motion to stay granted in part and denied in part, 803 F.2d 61 (2d Cir.1986). See also Heikkila v. Carver (In re Carver), 828 F.2d 463, 464 (8th Cir.1987) (rejecting debtor's claim that "routine certification" by clerk of court that debtor failed to redeem contract within redemption period was "judicial proceeding" within meaning of § 362).

However, the Appellate Division, Second Department case of International Fidelity Ins. Co. v. European American Bank, 129 A.D.2d 679 (2nd Dept. 1987), is more akin to the facts in the instant matter. The Court made the finding that the commencement of an action in violation of the automatic stay is an act that is voidable stating the following [129 A.D.2d at 679-680]:

> The appellant's service of a summons against the debtor, who had filed a petition for bankruptcy pursuant to USC chapter 11 violated the automatic stay provided for in that chapter against the commencement of actions against the debtor concerning preexisting debts (11 USC § 362 [a] [1]; Matter of Oliver, 38 Bankr 245, 247; Matter of Murray, 5 Bankr 732). However, the stay did not deprive the court of jurisdiction over the action commenced but merely suspended the proceedings (see, David v. Hooker, Ltd., 560 F2d 412; Matter of Lahman Mfg. Co., 31 Bankr 195). While acts taken in violation of the stay may be voided in appropriate circumstances where they have prejudiced the other parties to the bankruptcy proceeding (Matter of Oliver, supra., at 948; Matter of Fuel Oil Supply & Terminaling, 30 Bankr 360) no such prejudice occurred here (cf., D & D Realty v. Lionel Corp., 87 AD2d 859). The debtor was not prejudiced since the appellant ceased prosecution of the

> action when informed of the bankruptcy proceeding and only moved to secure a default judgment against the debtor two months after the dismiss al of the bankruptcy proceeding terminated the automatic stay.

Further, the Appellate Division, Second Department, in Carr v. McGriff, 8 A.D.3d 420 (2nd Dept. 2004), in distinguishing the International case from the facts set forth in Carr, held accordingly [8 A.D.3d at 422- 423]:

> The United States Bankruptcy Code provides for an automatic stay of certain prescribed actions against the debtor or the debtor's property (see 11 USC § 362 [a]). The automatic stay is one of the fundamental debtor protections provided by the bankruptcy law (see Midlantic Natl. Bank v New Jersey Dept. of Envtl. Protection, 474 US 494, 503 [1986]; In re Best Payphones, 279 BR 92, 97 [SD NY 2002]; Eastern Refractories Co. v Forty Eight Insulations, 157 F3d 169, 172 [2d Cir 1998]). It is effective immediately upon filing without further action (see In re Best Payphones, supra; Eastern Refractories Co. v Forty Eight Insulations, supra; Rexnord Holdings v Bidermann, 21 F3d 522, 527 [2d Cir 1994]). Moreover, it is not limited to the litigants, and extends to the nonbankruptcy court as well. "Once triggered by a debtor's bankruptcy petition, the automatic stay suspends any non-bankruptcy court's authority to continue judicial proceedings then pending against the debtor. This is so because [section] 362's stay is mandatory and 'applicable to all entities', including state and federal courts" (Maritime Elec. Co. v United Jersey Bank, 959 F2d 1194, 1206 [3d Cir 1991], quoting 11 USC § 362 [a]; see In re Best Payphones, supra).
>
> "[A]ny proceedings or actions described in section 362 (a) (1) are void and without vitality if they occur after the automatic stay takes effect" (Rexnord Holdings v Bidermann, supra at 527; see In re Best Payphones, supra). This includes most post-petition judicial actions. Although ministerial court actions are excepted (see Rexnord Holdings v Bidermann, supra [entry of judgment by clerk is not a continuation of judicial proceeding under section 362 (a) (1)]), the issuance of a decision by a judge is clearly prohibited and, therefore, void (see In re Best Payphones, supra at 97-98; In re Soares, 107 F3d 969, 975 [1st Cir 1997] [state court's post-petition direction to enter a default judgment against the debtor violated the automatic stay and was void]).

Although an action in violation of the stay is void, the bankruptcy court has the power to validate it. Congress has declared that actions to terminate, annul, or modify the automatic stay are core bankruptcy proceedings (see In re Siskin, 258 BR 554, 561-562 [ED NY 2001]; 28 USC § 157 [b] [2] [G]). Consequently, it is undisputed that only a bankruptcy court has jurisdiction to terminate, annul, or modify the automatic stay (see In re Siskin, supra; see also Eastern Refractories Co. v Forty Eight Insulations, supra; Farley v Henson, 2 F3d 273 [8th Cir 1993]).

In the case at bar, it is undisputed that the orders of the Supreme Court issued between March 22, 1996, and August 28, 1997, and those issued between October 31, 1997, and November 14, 2002, were issued in violation of the automatic stay of the Bankruptcy Code. This includes the order dated April 11, 1996, finding the defendant in default for her failure to appear or answer and appointing a referee to compute, the referee's report dated June 14, 1996, and the judgment of foreclosure and sale dated September 25, 2001. In deciding the defendant's motion, inter alia, to vacate these orders, the Supreme Court determined that the acts taken in furtherance of the foreclosure action during the pendency of the bankruptcy proceedings were not void but merely voidable. The Supreme Court went on to conclude that issuance of the orders did not violate the automatic stay because the defendant was not prejudiced by the continuation of the foreclosure action during the pendency of the bankruptcy petition. The effect of the Supreme Court's order in the case at bar was to annul the automatic stay nunc pro tunc.

The orders issued by the Supreme Court in violation of the automatic stay were void, and the Supreme Court was without authority, in effect, to annul the automatic stay of the Bankruptcy Code and ratify the orders issued during the pendency of the stay (see Rexnord Holdings v Bidermann, supra; Eastern Refractories Co. v Forty Eight Insulations, supra). The case relied upon by the Supreme Court is distinguishable. In International Fid. Ins. Co. v European Am. Bank (129 AD2d 679 [1987]), this Court held that the mere commencement of an action in violation of the automatic stay should not be voided where the bankruptcy petition did not deprive the Supreme Court of jurisdiction over the action and where the plaintiff ceased prosecution of the action when informed of the bankruptcy proceeding (accord Kleinsleep Prods. v McCrory Corp., 271 AD2d 411, 412 [2000]; cf. Bell v Niagara Mohawk Power Corp., 173 Misc 2d 1042, 1044-1045 [Sup Ct, Albany County, Graffeo, J., 1997]).

Here, despite the ambiguities and contrary determinations between the respective departments of the Appellate Division, and indeed, the discrepancies present in the Second Department precedent, this Court finds that the filing by plaintiff of the instant pleadings in violation of the bankruptcy stay, renders the pleadings voidable, and not void ab initio. "Commencement of the action violated the automatic stay provisions of the United States Bankruptcy Code [], however, 'the stay did not deprive the court of jurisdiction over the action commenced but merely suspended the proceedings' (citations omitted). While acts taken in violation of the bankruptcy stay may be voided under appropriate circumstances 'where they have prejudiced the other parties to the bankruptcy proceeding' (citations omitted), no such prejudice occurred here." Kleinsleep Products, Inc. v. McCrory Corp., 271 A.D.2d 411, 412 (2nd Dept. 2000); Millner v. House Beautiful Apartment Corp., 287 A.D.2d 696 (2nd Dept. 2001). Consequently, the cross-motion by defendant Terrapin Industries, LLC, pursuant to CPLR § 3211, dismissing plaintiffs' complaint against it is denied.

With regard to plaintiffs' motion, "under CPLR 306-b, leave to extend the 120 day period should be liberally granted, particularly in those cases where expiration of the Statute of Limitations would prohibit recommencement of the action." Estate of Jervis v. Teachers Insurance and Annuity Association, 181 Misc.2d 971 (1999); see, Owens v. Chhabra, 72 A.D.3d 664 (2nd Dept. 2010); DiBuono v. Abbey, LLC, 71 A.D.3d 720 (2nd Dept. 2010); Rosenzweig v. 600 North Street, LLC, 35 A.D.3d 705 (2nd Dept.2006); Chiaro v. D'Angelo, 7 A.D.3d 746 (2nd Dept. 2004); Scarabaggio v. Olympia & York Estates Co., 278 A.D.2d 476 (2nd Dept. 2000). Accordingly, as plaintiffs served the pleadings on October 20, 2008, and re-served same on July 2, 2010, the motion for leave to serve the summons and complaint upon defendant is granted to the extent that the underlying pleadings are deemed served nunc pro tunc. Defendant Terrapin shall have twenty (20) days after service upon it of a copy of this order with notice of entry, to interpose responsive papers, to the extent not already served.

Dated: May 9, 2011

_____
J.S.C.